

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

SHARON ROLES

Claimant

VS.

LEARJET, INC.

Respondent and
Self-Insured

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Docket No. 267,790

ORDER

Respondent appeals from a preliminary hearing Order entered by Administrative Law Judge Nelsonna Potts Barnes on September 27, 2001.

ISSUES

This case involves a claim for neck, both shoulders and back injuries that are alleged to have occurred “[e]ach and every working day between 5-29-01 and 6-01-01.”¹ At the preliminary hearing claimant was seeking payment of past medical bills, medical treatment with Dr. Duane Murphy, as authorized medical, appointment of Dr. Jane Drazek as authorized treating physician, and temporary total disability compensation beginning June 4, 2001 and continuing until she is released to work.² Respondent denied claimant met with personal injury by accident on the dates alleged and denied any accidental injury arose out of the employment. Respondent argued in the alternative that if the claim is compensable, temporary total disability benefits should be denied because claimant was terminated “for cause.”

On appeal, respondent describes the issues as whether claimant met with personal injury by accident arising out of and in the course of her employment with respondent, and if so, whether claimant’s termination for cause precludes an award of temporary total disability compensation. Respondent also argues the claim is not compensable because

¹ Form K-WC E-1 Application for Hearing and Form K-WC-E-3 Application for Preliminary Hearing, filed July 11, 2001.

² Claimant’s Counsel’s cover letter to the Director dated July 6, 2001, sent with the Application for Hearing and the Application for Preliminary Hearing specified that “Claimant is seeking the . . . determination of Dr. Duane Murphy as the treating physician. . . .” But at the September 25, 2001 Preliminary Hearing, Claimant’s Counsel announced that she was requesting Dr. Jane Drazek to be named as the authorized physician. Tr. of Prel.H. at 7.

“at most claimant has only suffered a temporary worsening of symptoms resulting from her work activities.”³

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Claimant worked for respondent over twelve years, most of that time as a sheet metal assembler. This claim is for injuries claimant alleges she suffered over a four day period beginning May 29, 2001, and ending on June 1, 2001, her last day of work for respondent. She was terminated on June 11, 2001.

Claimant was off work due to upper extremity injuries beginning the latter part of 2000 until May 29, 2001. Those upper extremity injuries are the subject of a separate workers' compensation claim. Claimant had been taken off work and told by respondent that she would not be returned to work until she was given a full release, without restrictions, by the treating physician, Dr. Morris. At claimant's request, Dr. Morris gave claimant a release to return to work with no restrictions on a trial basis. Claimant returned to work on May 29, 2001. Dr. Morris was the authorized treating physician for claimant's upper extremities. He did not evaluate or treat claimant's back. Hence, it was understood that Dr. Morris' release pertained to claimant's upper extremities. It did not, therefore, constitute a release from Dr. Fleming's 1990 restrictions for claimant's back of “no lifting over 25 lbs. with no excessive bending and twisting.”

Claimant worked her full shifts on May 29, 30 and 31. On June 1, 2000, however, claimant was unable to complete her shift due to pain in her shoulders, neck, and back. She asked for, and was allowed, to take a half-day vacation. On June 3, 2001, claimant went to the hospital emergency room due to back pain. On June 4, 2001, claimant notified her supervisor that she was injured. At that time claimant also mentioned the restrictions she had been given by Dr. Fleming in 1990 for an earlier work related back injury. Although these restrictions were a part of claimant's file with respondent, they had apparently been overlooked when claimant was returned to work in May, 2001. Because claimant had not mentioned these restrictions when she presented the release from Dr. Morris for her upper extremity injuries, she was terminated for “Providing [f]alse information to the Company.”⁴

Respondent contends, inter alia, that this termination for cause precludes claimant from receiving workers' compensation benefits, including preliminary benefits of medical treatment and temporary total disability compensation. Respondent also disputes that

³ Brief of Appellant Respondent Self-Insured and Third Party Administrator In Support of Appeal of Preliminary Hearing Order Dated September 27, 2001, at 11.

⁴ Tr. of Prel. H., at 19., Ex. 4. (Sept. 25, 2001).

claimant's work activities during the period of May 29 through June 1, 2001, caused or contributed to her neck, back and shoulder injuries. Respondent argues that instead these injuries were preexisting. In addition, respondent argues that even if the work on those dates aggravated claimant's preexisting condition, benefits are still not payable because it was merely a temporary aggravation.

In general, the Kansas Workers Compensation Act requires employers to compensate employees for personal injuries or aggravations of preexisting injuries incurred through accidents arising out of and in the course of employment.⁵ The question of whether there has been an accidental injury arising out of and in the course of employment is a question of fact.⁶ The question of whether an aggravation of a preexisting condition is compensable under workers compensation turns on whether claimant's work activity aggravated, accelerated or intensified the disease of affliction.⁷

There is no dispute that claimant's job duties after her return to work, and in particular on May 31 and June 1, involved repetitive and physically demanding work. Claimant related her back, neck and shoulder symptoms to that work. This is supported by the subsequent medical treatment records in evidence. Respondent points to claimant's prior injuries and medical treatment, including a visit to her personal physician, Dr. Terry Summerhouse, in May, 2001 for complaints that included neck pain as evidence that claimant's condition was not caused by the return to work, but instead preexisted her return to work. However, no physician testimony and no medical treatment records or reports in evidence, refute claimant's assertion that her work activities caused or worsened her symptoms. The Appeals Board finds that claimant's condition is the result of her performing work for respondent on the dates alleged. Claimant's condition, therefore, arose out of and in the course of her employment with respondent and claimant is entitled to medical treatment for this injury or aggravation of her preexisting condition.

As to respondent's argument that claimant's injury is not compensable because it is not a permanent injury, the Workers Compensation Act does not require a work related injury to be permanent in order for it to be compensable. Preliminary benefits of medical treatment and temporary total disability compensation are payable even where the accident has only temporarily aggravated, accelerated or intensified an affliction. In West-Mills v. Dillon Companies, Inc., 18 Kan. App. 2d 561, 859 P.2d 382 (1993) the Court held that the employer was not liable for the payment of permanent disability compensation where the permanency of the condition was not work related. "Where the permanency of the

⁵ K.S.A. 44-501(a); Kindel v. Ferco Rental, Inc., 258 Kan. 272, Syl. ¶ 2, 899 P.2d 1058 (1995); Baxter v. L. T. Walls Co., 241 Kan. 588, 738 P.2d 445 (1987).

⁶ Harris v. Bethany Medical Center, 21 Kan. App. 2d 804, 909 P.2d 657 (1995).

⁷ Boutwell v. Domino's Pizza, 25 Kan. App. 2d 100, 121, 959 P.2d 469, *rev. denied* 265 Kan. 884 (1998).

condition does not result from the work-related injury, the employer is not liable for the payment of permanent partial benefits.” But the Court held the employer was liable for the temporary injury, “. . . the temporary flare-up in [claimant’s] symptoms was work-related, and, thus, compensable as an accidental injury. . . .”⁸

Here, it may be argued that if claimant suffered only a temporary aggravation her condition has now returned to its prior or pre-accident level such that there is no need for additional medical treatment and no longer any temporary disability. This may be the factual situation now, or it may become so in the future, but until evidence to this effect is placed in the record no fact finder can act on it.⁹

As to respondent’s contention that temporary total disability compensation should not be awarded, the Appeals Board reminds respondent that this is an appeal from a preliminary hearing order. Therefore, not every alleged error in law or fact is subject to review. Generally, preliminary hearing awards can be reviewed only when it is alleged the Judge exceeded his or her jurisdiction in granting or denying benefits.¹⁰ In addition, preliminary hearing findings of whether (1) the worker sustained an accidental injury, (2) the injury arose out of and in the course of employment, (3) notice was given or claim timely made, or (4) certain defenses apply, are deemed jurisdictional and subject to review from a preliminary hearing order.¹¹ The Board has held on numerous occasions that the term “certain defenses” refers to defenses which dispute the compensability of the claim under the Workers Compensation Act.

An issue concerning claimant’s entitlement to temporary total disability compensation, separate from issues concerning the overall compensability of the claim for workers compensation benefits, is not a jurisdictional issue listed above and does not otherwise amount to an allegation that the Judge exceeded her jurisdiction. Instead, the question presented by respondent is whether the Judge erred in applying the law to a preliminary hearing issue over which the Judge had jurisdiction. This issue is not subject to review at this stage of the proceedings and is dismissed.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the September 27, 2001, Order entered by Administrative Law Judge Nelsonna Potts Barnes should be, and is hereby, affirmed.

⁸ West-Mills v. Dillon Companies, Inc., 18. App. 2d at 566.

⁹ Jackson v. Stevens Well Service, 208 Kan. 637, 641-642, 493 P.2d 264 (1972).

¹⁰ K.S.A.. 44-551(b)(2)(A).

¹¹ K.S.A.. 44-534(a)

IT IS SO ORDERED.

Dated this ____ day of January 2002.

BOARD MEMBER

c: Shayla Johnston, Attorney for Claimant
 Vincent Burnett, Attorney for Respondent
 Nelsonna P. Barnes, Administrative Law Judge
 Philip S. Harness, Workers Compensation Director